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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

BERNARD LIPSEY and DANIEL WEXLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Bernard Lipsey and Daniel Wexler, respectfully pray that a writ of certiorari issue to review the judgment and per curiam opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 19, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported,

appears in the appendix hereto (Appendix p. 1). No opinion was rendered by the District Court, Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 19, 1971. A timely petition for rehearing en banc was denied on April 7, 1971, and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the growing practice in the Ninth Circuit of rendering brief per curiam opinions which do not deal with the legal contentions of appellants satisfies the requirements of adequate appellate review or is an abdication of appellate responsibility and a violation of due process of law.

2. Whether the refusal of an accused to sign a waiver of *Miranda*[1] rights indicates a refusal to consent voluntarily to police interrogation, and whether such refusal places a heavy burden on the prosecution to demonstrate that incriminating statements subsequently made are, in fact, not induced by improper police practice.

3. Whether the standards utilized and procedures applied by the District Court and Court of Appeals provide an inadequate determination of the issue of voluntariness of statements made during police interrogation, in violation of due process of law.

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1 *Miranda v. Arizona*, 384 U.S. 436.

4. Whether the presumption contained in a jury instruction given in the instant case, permitting the jury to find knowledge on the part of the petitioners that certain securities were stolen from the finding of the mere fact of possession, is an irrational presumption in violation of due process and in conflict with certain recent decisions of this Honorable Court.

5. Whether securities which were stolen in New York and later transported to California, and which were in the possession of petitioners in California, can be considered, without more, to be in interstate commerce.

6. Whether the standard of reasonable doubt and burden of proof as described in Mathes & Devit Jury Instruction No. 8.01 is constitutionally deficient and an incorrect interpretation of these standards.

STATUTE INVOLVED

18 U.S.C. § 2315 has been set forth in the appendix hereto (Appendix p. 2).

STATEMENT OF THE CASE

In a one-count indictment, petitioners were charged with violation of 18 U.S.C. § 2315 (knowingly receiving stolen securities which were moving as and constituted a part of interstate commerce). A jury trial was had before the Honorable Jesse W. Curtis, and petitioners were convicted as charged and granted probation with one condition being service of 30 days in the county jail.

On September 24, 1969, petitioner Bernard Lipsey

telephoned Jon Darnall, his stockbroker, that he knew of "hot" securities that were available to sell. Mr. Darnall informed the FBI of this conversation. (R.T. 15-16).

Darnall, following FBI instructions, met petitioner Lipsey at the International House of Pancakes in Panorama City, California, where Darnall met petitioner Daniel Wexler. Wexler gave Darnall five securities that were to be examined for their authenticity (R.T. 19). The securities were carried by Wexler in a plain white envelope (R.T. 146). Darnall agreed to find a buyer for the securities (R.T. 24).

On September 29, 1969, Darnall contacted Lipsey and informed him that he had found a buyer for the securities and would meet Wexler and Lipsey at the Nutel Motel (R.T. 27). Lipsey and Wexler arrived at the motel at 6:00 p.m.; Wexler carried the attache case containing the stolen securities. The petitioners were introduced to the "buyer" . . . FBI Special Agent William White, who placed petitioners under arrest (R.T. 29-30).

On September 29, 1969, at about 6:00 p.m., after being arrested at the Nutel Motel, petitioner Wexler asked Agent White: "Can I please make a phone call?" Mr. White said, "No, not at this time. You will be able to make a call at the county jail." Wexler said, "Well, approximately when will that be?" Mr. White replied, "Around eight or so p.m." (R.T. 161).

After denying Wexler the right to make a phone call, Agent White handed Wexler a statement containing the *Miranda* warnings. Wexler testified:

> "Truthfully, I couldn't even hold the piece of paper let alone read it, I was that nervous, and I said, 'I can't read it and I'm not signing it.' "

Agent White then read the statement of rights to Wexler; Wexler did not understand the statement (R.T. 161-162).

Petitioner Lipsey similarly refused to sign the statement and was nevertheless questioned by Agent Baker.

Over petitioners' objections, Agent White was permitted to testify as to the interrogation of Wexler at the Nutel Motel. After Wexler had refused to sign the statement (R.T. 67, 74), Wexler informed White that a "Richie" (Richard Joseph Caroleo) had been the original source of the securities given to Darnall and the securities contained in the attache case (R.T. 68-71). Agent White testified that he did not recall Mr. Wexler asking permission to make a telephone call while he was being questioned at the motel (R.T. 77).

FBI Special Agent Robert Baker was also present at the Nutel Motel on September 29, 1969, in a surveillance capacity. Agent Baker orally informed Lipsey of his constitutional rights and offered him a statement to sign. As stated, petitioner Lipsey refused to sign the statement. (R.T. 81-84). Over objections made by defense counsel (R.T. 85), Agent Baker was allowed to testify to incriminating statements made by Lipsey while he was talking with Agent Baker (R.T. 252).

Petitioner Wexler testified that on September 19, 1969, he was told by a Mr. Fink that Mr. Fink's employee, Richard Carlyle (later identified as Caroleo) had "unregistered" securities to sell (R.T. 112-115). Not possessing sufficient funds to purchase the securities, Mr. Wexler asked his acquaintance Mr. Lipsey whether he knew of anyone interested in buying unregistered securities (R.T. 120). Mr. Lipsey then phoned his broker, John Darnall, who said that he might be

able to find a buyer for the securities. Mr. Wexler obtained all the securities in question from "Richie" (R.T. 146, 156). Mr. Wexler maintained that he had no knowledge that the securities were "hot" (R.T. 164).

Petitioner Bernard Lipsey testified that Mr. Wexler informed him that he had unregistered securities to sell. There was no mention of the fact that the securities were "hot." Mr. Lipsey then phoned his broker, Mr. Darnall, and discussed several "hot" stocks being sold on the market, i.e., stocks that were very active (R.T. 203-204). Lipsey stated that his only connection with the case was attempting to do Mr. Wexler a favor by helping him find a buyer for the securities (R.T. 229).

A stipulation between the parties was entered into evidence that the securities were, in fact, stolen, the stipulation reading as follows:

> "It is hereby stipulated by and between the plaintiff United States of America through its counsel of record and the defendants Bernard Lipsey and Daniel Wexler through their counsel of record as follows:
>
> "The sixty-three stock certificates referred to in the one count indictment which comprise Government's Exhibit No. 1 were stolen in New York after being placed in the mail by the Percell, Graham & Company stock brokerage firm in New York, New York, on or about September 3, 1969.
>
> "It is further stipulated that the stocks were subsequently transported to Los Angeles, California and that their value is in excess of $5,000."

THE QUESTIONS ARE SUBSTANTIAL

1. The Ninth Circuit Court of Appeals' decision in the instant case consists of a one-paragraph per curiam opinion which deals casually with two of the points of error raised by petitioners before that court. The constitutional claims are, by and large, swept aside without a word. It is submitted that this kind of procedure on the part of the Courts of Appeals is an abdication of responsibility, resulting in serious interference with the right to due process of law. This Honorable Court accepted certiorari in the case of *Benton v. Maryland*, 395 U.S. 784 (1969), in order to elucidate the role of the lower courts in analysing with particularity the constitutional claims of the appellants before them. The instant case presents an even clearer case of the problems raised in *Benton*—but which the Court left unresolved—since, in this case, the Ninth Circuit made no mention of petitioners' constitutional claims. A continuation of the present and growing practice of issuing brief per curiam opinions by the Courts of Appeals will result in serious interference with the constitutional rights of all persons who find themselves similarly situated as these petitioners.

First, it is obvious that appeals courts have a duty to make clear the bases of their decisions on particular points of law in order to fulfill their role with respect to *res judicata* and *stare decisis*. (See, generally, Hart and Sacks, "*The Legal Process*," Chap. VII, Tent.Ed.1958.) The alternative is uncertainty and loss of clarity in the law. Especially with regard to criminal defendants, this result would be intolerable.

Second, it is clear that the Courts of Appeal are

bound by decisions of this Honorable Court. Per curiam opinions offer no method of insuring that the Courts of Appeals are, in fact, applying the law as this Court has interpreted it.

Third, a related problem is posed with respect to the individual petitioner who wishes to petition for a writ of certiorari before this Court. Under Supreme Court Rule 19, this Court is guided in its decision to grant certiorari by conflict between the decisions of the Courts of Appeals in the various circuits or by conflict between a Court of Appeals and this Court. A petitioner attempting to assert a claim under either of these provisions will be in the difficult position of attempting to infer meaning from silence. The problem is more serious since it is clear that in some cases this Court will not set aside a decision of a Court of Appeals unless there is an affirmative indication of the incorrectness of the court's reasoning. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185.

Fourth, petitioners face a similar problem in the event they should wish to avail themselves of their rights under 28 U.S.C. § 2255. See *Kaufman v. United States*, 394 U.S. 217 (1969).

2. The Ninth Circuit Court of Appeals' decision in this case necessarily implies that the prosecution established that the securities involved in the instant case were in interstate commerce. See Appellants' Opening Brief, page 6. This decision is in conflict with decisions rendered in other circuits regarding the nature of interstate commerce. In *Gable v. United States*, 84 F.2d 929 (7th Cir. 1936), the court was faced with a situation which was remarkably

similar to the factual setting of the instant case. The court in the *Gable* case indicated that the securities there involved were not stolen while in interstate commerce but were stolen in one state, thereafter transported to another, and then delivered to the appellant; "[c]onsequently, there is no proof of guilt under section 416 [the predecessor to 18 U.S.C. § 2315]." A variety of circuits have held that the interstate aspect of commerce ends when the goods are at a destination and are delivered. *Murphy v. United States*, 133 F.2d 622 (6th Cir. 1943); *Chapman v. United States*, 151 F.2d 740 (8th Cir. 1945). However, as the apparent decision in this case illustrates, there is a need for this Honorable Court to make a definitive statement to settle the lingering doubts concerning the permissible breadth of the duration of the interstate aspect of commerce. See *United States v. Maddox*, 394 F.2d 297 (3rd Cir. 1968). With regard to this point, it should be noted that the majority of the cases which deal with the definition and the termination of interstate commerce as a jurisdictional fact are over fifteen years old.

Furthermore, in the instant case, the court effectively removed the proper standard for the factual determination from the jury, through its instruction relating to the determination of interstate commerce. The instruction given was as follows:

> ". . . the evidence here is such as would support either conclusion, that it is in interstate shipment or that the interstate shipment has ceased. I am not commenting on the evidence. You may feel that the evidence is very clear one way or the other, but I am merely

> saying from a legal standpoint there is sufficient evidence–that means that it only has to be a very little–but there is sufficient here that would support either conclusion. Otherwise I wouldn't give you the instruction." (R.T. 340, ll. 1-10.)

Petitioners submit that an instruction of this kind is directly contrary to the notions of due process as enunciated by this Court in *In re Winship*, 397 U.S. 358 (1970). Furthermore, this instruction poses a problem which this Court has not directly answered. The trial court has apparently stated that a finding on the jurisdictional fact in favor of petitioners would not be unreasonable. If this is so, it necessarily follows that a finding against petitioners would not be proved beyond a reasonable doubt. Thus, submitting this question to the jury would, in effect, violate the dictate of the *Winship* case, *supra*. A definitive statement on the application of the reasonable doubt standard, as it is applicable to this case, would have a widespread effect of resolving disputes which center around the application of the standard to be applied by the trial court before submission to the jury (for example, in conspiracy cases).

3. In the landmark decision of *Miranda v. Arizona*, 384 U.S. 436, this Court established certain procedures to be followed to insure that a criminal suspect is adequately aware of his constitutional rights before an attempt to elicit incriminating statements is made. This Court indicated at pages 473-4 that if any indication is made by the individual that he wishes to remain silent, the interrogation must cease . . . "at this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement

taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

The factual situation of this case presents several problems concerning the *Miranda* decision which this Court has yet to answer. The importance of these questions relates not only to the conviction of the petitioners but to the procedure used by federal authorities relative to *Miranda* and the procedures used by the trial courts to make the pretrial determination of voluntariness as set out in *Jackson v. Denno*, 378 U.S. 368 (1964).

As set out in the statement of the case, both petitioners refused to sign the written *Miranda* waiver forms, and Wexler was denied the right to make a phone call. After these incidents, incriminating statements were taken by the federal agents and were ultimately admitted into evidence. The initial problem is whether the facts of this case indicate a voluntary waiver of the rights enunciated in the *Miranda* decision. Through their refusal to sign the forms, petitioners indicated a desire to remain silent. Under the *Miranda* decision, further questioning must cease. The waiver form provides a ready method for agents to ascertain the voluntariness of subsequent statements. When the waiver is not signed upon request, obviously an intention to remain silent is manifested. The Supreme Court of the State of California has indicated precisely this in *People v. Fioritto*, 68 Cal.2d 714 (1968). The District Court and the Ninth Circuit Court of Appeals have adopted the contrary view, by allowing the introduction into evidence of the statements taken in the present case. It is hard to comprehend how a clearer refusal to submit to interrogation could be manifested. This discrepancy between the state and federal courts in the same

jurisdiction must be resolved by this Court.

A second fundamental difficulty which has been left unanswered is the standard to be applied by the courts in rendering a decision on the voluntariness of incriminating statements. Clearly, this Court has attempted to reduce the difficulty of the trial court's task in this area by providing a simply administerable rule rather than the necessity of a complicated fact-finding determination. However, the courts are still left with the necessity of making a determination of waiver of these rights. The waiver form provides a method comparable to the rationale of the original *Miranda* "warnings." The failure of the agents to secure the signature, together with the testimony of the petitioners, should shift to the prosecution a very heavy burden of proof. That burden was clearly not met here.

4. The court instructed the jury in the instant case: "Possession of property recently stolen if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen." (R.T. 336).

The substance of this instruction is substantially similar to the instruction which this Court struck down in *Leary v. United States*, 395 U.S. 6 (1969). In both, the possessor might conceivably conclude that the origin of the material in question was from an illicit source. However, in this case, the knowledge that the property is stolen is certainly no more rational than the inference in *Leary* that the mari-

juana was illegally imported. In neither case is possession alone sufficient to allow the possessor to reasonably draw conclusions concerning the origin of the material. Certainly, possession is not sufficient to establish this element beyond a reasonable doubt, as is required by due process. *In re Winship, supra.* See, also, *United States v. Romano,* 382 U.S. 136 (1965), in which this Court held that presence at an illegal still carries no reasonable inference of possession, custody or control.

5. The trial court gave the Mathes & Devit jury instruction relative to burden of proof and reasonable doubt (No. 8:01). Although often approved by the Ninth Circuit Court of Appeals, the instruction has not gone without criticism. See *McGill v. United States,* 318 U.S. 791; 796 (D.C. Cir. 1965); also, *Holland v. United States,* 348 U.S. 110 (1954). This Court, in *In re Winship, supra,* explicitly held that the "due process clause" protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In the *Winship* case, *supra,* the Court held that the "preponderance of the evidence" test was constitutionally insufficient. The standard set forth in the Mathes & Devit instruction is one which is found in the California Government Code, under § 11513, as a burden necessary in an *administrative* proceeding, i.e., " . . . evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . " (this is the test for admissibility of the evidence under the California statutes).

The "clear and convincing" standard, which is

one notch below "beyond a reasonable doubt" in a criminal proceeding, has been defined as "clear, explicit and unequivocal," "so clear as to leave no substantial doubt" and "sufficiently strong to demand the unhesitating assent of every reasonable mind." See *In re Jost,* 117 Cal.App.2d 379, 383 (1953); *People v. Martin,* 2 Cal.3d 822, 833 (1970); and *People v. Caruso,* 68 Cal.2d 183, 190 n. 14 (1968).

This Honorable Court should decide the propriety of the instruction used in the instant case, which is used throughout many circuits, but the constitutionality of which is in doubt.

CONCLUSION

Petitioners respectfully request that a writ of certiorari issue to test the validity of the instant conviction.

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN, LONDON,
SCHWARTZ & LEVENBERG

Attorneys for Petitioners

APPENDIX

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OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. BERNARD LIPSEY and DANIEL WEXLER, Appellants.

No. 26,192.

[February 19, 1971]

Appeal from the United States District Court
Central District of California

Before: KOELSCH, ELY and KILKENNY, Circuit Judges.

PER CURIAM:

Appellants were indicted, tried by a jury, and convicted of receiving, in violation of 18 U.S.C. § 2315, stolen stock certificates which had been transported in interstate commerce.

With the exception of one ruling which excluded evidence offered for purposes of impeachment, we find appellants' assignments of error to be without substance. After an exhaustive study of the record, we hold that the evidentiary ruling, even if erroneous, was harmless within the meaning of Rule 52(a), FRCrimP. Taken as a whole, the court's instructions to the jury, which are now challenged, fairly stated the applicable law and, in any event, were not objected to at the trial. In the absence of plain error, which does not here exist, the instructions cannot be attacked on appeal.

AFFIRMED.

STATUTE INVOLVED

18 U.S.C. § 2315.

Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned

not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; Oct. 4, 1961, Pub.L. 87-371, § 3.75, Stat. 802.

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding, that

My business address is 322 Main Street, Huntington Beach, California 92648, that on MAY 6th, 1971, I served the within PETITION FOR WRIT OF CERTIORARI (Lipsey v. United States of America) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543
[3 copies]

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 6th, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer